MOTION FILED
DEC 30 1981

No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, *Petitioners*,

v.

AMY ROWLEY, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE and AMICI CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION and THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. IN SUPPORT OF APPELLANTS

GWENDOLYN H. GREGORY
Counsel of Record

Deputy Legal Counsel
National School Boards Association
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 337-7666

THOMAS A. SHANNON
Executive Director
National School Boards Association

AUGUST W. STEINHILBER
Associate Executive Director
and Legal Counsel
National School Boards Association

McGIVERN, SHAW & O'CONNOR
Attorneys for the New York State School Boards Association, Inc.
119 Washington Avenue,
Albany, New York 12210
(518) 465-3474

Of Counsel:
NORMAN H. GROSS, ESQ.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, *Petitioners*,

v.

AMY ROWLEY, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF THE NATIONAL SCHOOL BOARDS ASSOCIATION and THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. TO FILE BRIEF AS *AMICI CURIAE*

The National School Boards Association and the New York State School Boards Association, Inc. move this Court for leave to participate as *amici curiae* herein, for the purpose of filing the attached brief in support of appellants.

Consents to file this brief have been obtained by phone. The corresponding letters are in the mail, and will be filed with the Court upon receipt.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy Legal Counsel
National School Boards Association
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 337-7666

THOMAS A. SHANNON
Executive Director
National School Boards Association

AUGUST W. STEINHILBER
Associate Executive Director
and Legal Counsel
National School Boards Association

McGIVERN, SHAW &
O'CONNOR
Attorneys for the New York
State School Boards
Association, Inc.
119 Washington Avenue,
Albany, New York 12210
(518) 465-3474

Of Counsel:
NORMAN H. GROSS, ESQ.

No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, *Petitioners,*

v.

AMY ROWLEY, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MEMORANDUM OF THE NATIONAL SCHOOL BOARDS ASSOCIATION and THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The National School Boards Association and the New York State School Boards Association, Inc. have moved this Court for leave to appear as *amici curiae* herein for purposes of filing the attached brief in support of appellants. Consent has been obtained from counsel for all parties.

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public schools, and to preserve the unique American tradition of local lay control, with education policy decisions rendered by those directly accountable to the public through the elective or appointive process. In its fortieth year, the National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who make up this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions. The National School Boards Association submits this brief in the belief that the decision of the U.S. Court of Appeals for the Second Circuit threatens the ability of the nation's school boards to effectively educate all the students entrusted to their care by eroding in significant measure the authority of states and school boards to make educational determinations based upon local and state fiscal and administrative concerns.

The New York State School Boards Association is a corporate instrumentality of the school districts of the State of New York and represents approximately seven hundred forty (740) such school districts, including the Hendrick Hudson School District. Each of its members receives, or is eligible to receive, financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401, *et seq.* (P.L. 94-142).

If the order of the Court below is affirmed, it may have a substantial effect on the formulation, content, financing and administration of the educational programs of every school district in the State of New York. In particular, it will have an effect on education of the deaf and on the requirement of educating handicapped children in the least restrictive environment.

As the decision in this case will have an impact on school districts throughout the country, the National School Boards Association and the New York State School Boards Association, Inc. urge this court to grant leave to present their views.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy Legal Counsel
National School Boards Association
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 337-7666

THOMAS A. SHANNON
Executive Director
National School Boards Association

AUGUST W. STEINHILBER
Associate Executive Director
and Legal Counsel
National School Boards Association

McGIVERN, SHAW &
O'CONNOR
Attorneys for the New York
State School Boards
Association, Inc.
119 Washington Avenue,
Albany, New York 12210
(518) 465-3474

Of Counsel:
NORMAN H. GROSS, ESQ.

TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

ISSUE PRESENTED FOR REVIEW 2

ARGUMENT

Introduction 2

Education of the Handicapped—the Duty 4

The Education of All Handicapped Children Act and Its Legislative History 6

Judicial Restraint in Education Decision-making.. 12

Supreme Court Decisions under Section 504 and the Developmental Disability Act 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES:

Abington School District v. Schempp, 374 U.S. 203 (1963) 13

Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981) 18

Board of Education of Hendrick Hudson School District v. Rowley, 632 F.2d 945 (2d Cir. 1980) 23

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) 4

Donohue v. Copiague Union Free School District, 64 A.D.2d 29 (1978), *aff'd*, 47 N.Y.2d 440 (1979). 19, 20, 23

Epperson v. Arkansas, 393 U.S. 97 (1968) 13

Keyes v. School District No. 1, Denver, Colorado, 521 F.2d 465 (10th Cir.), *cert. den.*, 423 U.S. 1066 (1976) 16

Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979) 21

Table of Authorities Continued

Page

Mercer v. Michigan State Board of Education, 379 F. Supp. 580 (E.D. Mich. 1974), *aff'd mem.*, 419 U.S. 1081 (1974) 13

Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972) 4, 9

Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, 334 F. Supp. 1357 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972) 5, 9

Pennhurst State School and Hospital et al. v. Halderman et al., —— U.S. ——, 101 S.Ct. 1531 (1981). 26, 27

Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976) 19, 20

Rowley v. Board of Education of Hendrick Hudson School District, 483 F.Supp. 528 (S.D.N.Y. 1980).. 3, 8, 14, 16, 17, 22

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 25, 26

STATUTES:

20 U.S.C. § 1401 *et seq.* 2

20 U.S.C. § 1401(16) 10

20 U.S.C. § 1401(18) 9

20 U.S.C. § 1401(19) 2

20 U.S.C. § 1412(5) 11

20 U.S.C. § 1414(a)(5) 2

20 U.S.C. § 1415(c) 23

29 U.S.C. § 794 5

P.L. 93-380, Section 612(d) 6

Table of Authorities Continued

Page

34 C.F.R. § 104.44(a) 25

34 C.F.R. § 300.349 17

34 C.F.R. § 300.550-556 11

OTHER AUTHORITIES:

F. J. Weintraub & A. R. Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, SYRACUSE L. REV. 1037 (1972) 28

Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40 (1974) 17

Large, *Special Problems of the Deaf under the Education for All Handicapped Children Act of 1975*, 58 WASH. UNIV. L. QUART. 213 (1980) 18

Smith & Knoff, *School Psychology and Special Education Students' Placement Decisions: I.Q. Still Tips the Scale*, 15 JOURNAL OF SPEC. EDUC. 55 (1981) ... 18

121 Cong. Rec. 23705 4

H.R. Report 93-1211, 193 (1974) 6

S.Rep. 94-168 (1975) 6

121 Cong. Rec. 23708 9

42 Fed. Reg. No. 86, May 4, 1977, Appendix A 15

No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, *Petitioners,*

v.

AMY ROWLEY, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICI CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION and THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. IN SUPPORT OF APPELLANTS

INTERESTS OF THE AMICI CURIAE

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. In its fortieth year, the National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The New York State School Boards Association is a corporate instrumentality of the school districts of the State of New York and represents approximately seven hundred forty (740) such school districts, including the

Hendrick Hudson School District. Each of its members receives, or is eligible to receive, financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401, *et seq.* (P.L. 94-142).

If the order of the court below is affirmed, it may have a substantial effect on the formulation, content, financing and administration of the educational programs of every school district in the State of New York. In particular, it will have an effect on education of the deaf and on the requirement of educating handicapped children in the least restrictive environment.

ISSUE PRESENTED FOR REVIEW

If we assume, *arguendo*, that with a particular service or educational methodology (such as "total communication"), a particular handicapped child will "fare better" in school, does the requirement in the Education for All Handicapped Children Act (P.L. 94-142) of a "free appropriate public education" require a school to provide that service or methodology to a handicapped child who is self-sufficient without the service and is progressing normally from grade to grade?

ARGUMENT

Introduction

Decisions such as the lower court's in this case threaten to erode local decision-making authority in education by displacing the decisions of the local education administrators and setting standards which go beyond the intent of Congress and decisions of this court.

P.L. 94-142 itself recognizes the importance of local decision-making in its requirement that an individual education program be developed for each handicapped child. 20 U.S.C. § 1414(a)(5) and 20 U.S.C. § 1401(19). The school system, based upon its expertise in the field of education

of handicapped children and upon the "unique" needs of the particular child, develops a program for the child. Nowhere in the Act, however, is there a requirement that the child reach "maximum potential", one standard noted by the District Judge Broderick's decision. The goal of the school district may differ depending on the intelligence level of the child—the goal for a severely retarded child may be to achieve self-sufficiency (a goal which may or may not be met depending on the severity of the handicap), or where a handicapped child has average or above average intelligence, the goal of the school system is to go from one grade to another and graduate with an average level of success. More than that cannot be required of a school system with regard to a handicapped child, any more than it can be required with regard to a non-handicapped child.

In order to understand the position of school boards on the pressing issue of their obligation to provide an education to all handicapped students in their school systems, it is important to look at the issue in the framework of the purposes of public education in this country.

Initially, the public schools were organized to teach citizenship and elementary basic skills to the "average" child. The system was not designed to handle the special needs of the "exceptional" child on either end of the spectrum—the gifted or the handicapped. In fact, many states expressly excepted from the requirements of mandatory education students found unable to profit from instruction. Of course, at that time "instruction" was defined in a narrow sense and included only one form of "instruction" *i.e.* the classic homogeneous classroom lecture method teaching only the "basics".

States and local school districts now recognize that each child in the school system must be treated as an individual. Educators are beginning to understand that strict equality of financial resources will not necessarily result in equality of educational opportunity. According to Office of Education

statistics, the cost of educating one handicapped child is in excess of twice as much as educating the non-handicapped. 121 Cong. Rec. 23705.

However, as the educational system swings from an emphasis on the group to an emphasis on the individual, we must assure that in the process we do not go so far as to exclude or substantially reduce services to the majority of students. If that happens, public support for public education will cease.

Education of the Handicapped—The Duty

Any legal analysis of the question of the duty to educate handicapped children must begin with *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954) which held first, that "an opportunity [of an education], where the State has undertaken to provide it, is a right which must be made available to all on equal terms" and second, that "separate educational facilities are inherently unequal." Since all states have taken upon themselves the duty to educate the children within their borders, the Equal Opportunity Clause of the 14th Amendment has been raised by Plaintiffs in several cases challenging methods of treatment of the handicapped by local school districts.

The first declaration that a constitutional duty exists to provide to all school-age children a public education arose in the U.S. District Court for the District of Columbia in *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972). In that case the school board had argued that the cost of providing an education to handicapped children would be prohibitive and, therefore, no duty existed to provide more than was provided to non-handicapped children. The court declared:

> The defendants are required by the Constitution of the United States, the District of Columbia Code and their own regulations to provide a publicly supported education for these "exceptional" children. . . . The District

of Columbia's interest in educating these excluded children must clearly outweigh its interest in preserving its financial resources. *If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia public school system whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.* (Emphasis supplied).

It would appear that the court in *Mills* recognized that all needs of the handicapped children in the district need not be served as long as the entire or disproportionate burden of inadequate financing was not borne by the handicapped population.

A year before *Mills*, the case of *Pennsylvania Association for Retarded Children (PARC)* v. *Commonwealth of Pennsylvania*, 334 F. Supp. 1357 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), presented the first case dealing with particular learning needs of the retarded. The case ultimately resulted in a consent agreement between the parties which recognized the principle that "each mentally retarded child must receive education and training appropriate to the child's capacity." This may have been the first judicial use of the term "appropriate" in the context of education of the handicapped.

By the time the Congress passed the Education for All Handicapped Children Act in 1975, *supra*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 some 45 cases on the subject of education of the handicapped had been decided by the courts.

None of these cases, however, related to the question of how far a school system must go in providing an "appropriate" education to handicapped children.

The Education of All Handicapped Children Act and Its Legislative History

The Education for All Handicapped Children Act of 1975, *supra*, replaced an earlier act which was passed the year before. That act, P.L. 93-380, included the first Congressional use of the word "appropriate" in the education context. In section 612(d) of P.L. 93-380 the Congress placed on the States the obligation:

> to provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation and educational placement of handicapped children, including but not limited to: . . . (b) procedures to insure that, *to the maximum extent appropriate*, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . .

Certainly it is clear that the 93rd Congress used the word "appropriate" as a limitation on its strong direction to "mainstream" handicapped children, a direction which was in line with case law and educational debate of civil rights advocates at that time. The Conference Report on the bill also indicates the intent to equate "appropriate" with full or equal educational opportunities. H.R. Report 93-1211 at 193 (1974).

In 1975 the Senate Committee on Labor and Public Welfare issued its report on S. 6 (which ultimately became the Education for All Handicapped Children Act of 1975), S. Rep. 94-168 (1975). The Report discussed the 1974 Act provisions on "appropriate" education:

> Amendments enacted in Public Law 93-380 established basic due process procedures and protections, a pri-

ority for service to handicapped children who are not receiving an education, a prohibition on discrimination in testing, and *provision of educational services in the least restrictive environment appropriate to the needs of the handicapped child. . . .* that a goal of providing full educational opportunities would be established, including a timetable for delivery of full services to all handicapped children; and that a description of the facilities, personnel and services necessary to meet such a goal be included.

In order to carry these planning provisions into actual delivery of services, the Committee bill adopts provisions to assure the right to education for handicapped children, to set a date by which handicapped children and their parents will be assured that they in fact have a right to education, and to establish a process by which State and local educational agencies may be held accountable for providing educational services for all handicapped children. Thus, the Committee bill provides that a State, in order to be eligible for funding must have *a "right to education" policy* for all handicapped children, that all handicapped children aged three to eighteen will have available to them by September 1, 1978 *a free appropriate public education*, and that all handicapped children aged three to twenty-one will have available to them by September 1, 1980, *a free appropriate public education.* (Emphasis supplied).

It would appear from this Committee language that the Committee intended to use the term "free appropriate public education" as a short-cut term for the language in the 1974 Act relating to mainstreaming. The word "appropriate", in other words, refers to *where* the child is placed, not the type of services to be provided.

The Congressional floor debate on S. 6 consisted primarily of prepared statements which emphasized that the Act was to serve two purposes: assist states and local school districts in meeting their duty to guarantee equal opportunity to handicapped children, and also serve the

public interest by making many handicapped persons self-sufficient rather than wards of the state.

The "equal opportunity" standard should be looked at in the context of "equal access" to the educational system. The cases cited by the Congress during its debate on P.L. 94-142 are all "access" cases. The states and school districts involved in these cases were completely excluding handicapped children from participation in the education program. Nothing in the legislative history of the statute indicates that the Congress intended "equal opportunity" to require school districts to determine that any "educational shortfall," 483 F. Supp. at 534, in the words of District Judge Broderick, which might be determined to be related to the handicap of the child, must be corrected by the school district. That definition of "equal oportunity" is simply not justified under the words of the statute or its legislative history.

Once the handicapped child is provided access to the school system, he or she must then be provided services with the goal of achieving self-sufficiency. As District Judge Broderick stated with regard to Amy Rowley, the "evidence firmly establishes that Amy is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade. . . ." *Id.* She, therefore, has certainly achieved the goal of "self-sufficiency."

But the courts below would have more. They argue that because Amy uses sign-language at home, because that is the preferred methodology of her parents, that she must be provided that service in the public schoolroom as well. That standard goes beyond both the "self-sufficiency" and the "equal opportunity" standard. There is nothing in the legislative history of P.L. 94-142 to indicate that a handicapped child has the absolute right to a methodology which her parents prefer, or which is the "best" which the "state of the art" has available. Learning styles vary

and, certainly, many non-handicapped children would do better in the public school system if the school system would adapt its teaching methodology to the individual needs of the student.

Given the concerns expressed by the Congress during debate on P.L. 94-142 on the question of the limited amount of money authorized by the law, and the likelihood of much less being appropriated, it is inconceivable that any reliance could be placed on the legislative history of the Act to support a proposition that Congress intended to require school districts to provide sufficient time, money, effort, etc. to assure that every handicapped child achieves his or her maximum potential or understands 100% of what transpires in the classroom.

If one looks at the prepared remarks of members of the respective committees, it can be seen that the matters with which they were concerned were basic equal access rights of handicapped children: "children are denied access to public schools because of lack of trained personnel because their children are viewed as an extra burden or for a variety of other reasons." 121 Cong. Rec. 23708.

Each statement mentions the several cases, such as *Mills* and *PARC*, which have upheld the right of handicapped children to a free appropriate public education. No statement defines "appropriate" or even suggests that the guarantee of an "appropriate" education would require more than "access" and the minimum amount of services to provide self-sufficiency, or in the case of Amy Rowley, to progress from grade to grade.

The phrase, "free appropriate public education", is defined in the Act as:

> . . . special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State education agency, (C) include an appropriate preschool, elementary or

> secondary school education in the State involved, and (D) are provided in conformity with the individualized education program. . . . 20 U.S.C. § 1401(18).

The definition of "special education" as included above is:

> . . . specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. 20 U.S.C. § 1401(16).

As we have seen, the Senate Labor and Public Welfare Committee Report indicates in the discussion of the 1974 version of the Act that the word "appropriate" was intended to cover the concept of "mainstreaming" and "least restrictive environment" while the term "special education" or "special services" was intended to require school districts to provide an equal opportunity of access to courses of study and services which are offered to non-handicapped children but in order that handicapped children may take advantage of such courses and services—must be offered in a different manner through the use of special aids and educational techniques. For example, courses in physical education and arts and crafts, if offered to non-handicapped children, must also be offered to handicapped children, even though the courses may have to be altered in order to provide access for a particular child. However, once access is provided and the minimum service level is provided to meet the goal of progression from grade to grade, the obligation to provide more ceases.

Section 1401(16) of P.L. 94-142 uses the term "unique needs," which means that in order to provide "access" to the system, special or different services may have to be provided to the handicapped child. Given the fact that Amy can lip read and, in fact, is able to succeed very well with the use of the lip reading technique, together with the other services

provided to her by the school system, her "unique" needs have been accommodated. The statute, through the use of the term "unique" needs", is merely taking into account the difference between the needs of a handicapped child and the needs of a non-handicapped child. It is not requiring that *all* of the needs of the handicapped child be met.

The decision below is also violative of legislative intent in another respect. Both 20 U.S.C. § 1412(5) and its accompanying regulations, 34 C.F.R. § 300.550-556, mandate that handicapped children be educated in the least restrictive environment. Appellees, and the experts whose testimony they presented, adhere to a philosophy that all deaf children require the presence of a sign language interpreter in the classroom in order to achieve their full potential. Appellees' experts who had observed Amy Rowley did not testify at either the impartial hearing or in the proceeding below. Those who did testify never observed the student in class, and based their testimony on the premise that since she is deaf, she requires an interpreter. All the school personnel who had worked with this child, or had observed her performance, however, testified that she had performed very well, both academically and socially in her current program, and that the services of a sign-language interpreter would be unnecessary and perhaps detrimental. Despite this evidence, the court below, concluded that *every* deaf child fares better in class with an interpreter, and since Amy Rowley is deaf, an interpreter is required in this case.

Logically, any requirement that a handicapped child be placed in the least restrictive environment carries with it a first-hand evaluation of that child's performance, so that an assessment may be made of the child's abilities, weaknesses and needs. Amici submit that the conclusion of the court below neatly categorizing all deaf children cannot be upheld without seriously damaging one of the basic tenets of the legislation on review in this case. Such a

blanket philosophy of the educational needs of all deaf persons cannot serve as the criteria for the placement and the provision of services to an individual child in the least restrictive environment, since it contains a rigid rule as to what that environment must include. In addition, the rule runs contrary to the spirit of the act, since it *mandates* rather than excludes a restriction, a restriction which must to some degree single out the deaf child to classmates as being "different."

In summary, neither the terms of the statute, its legislative history nor its accompanying regulations support the holding of the court below. Because an adequate education is presumably provided to all children, Congress mandated that it be provided to handicapped children as well. In so doing, however, Congress did not intend, as the court below erroneously held, that a specific class of handicapped children must receive a certain service, wherever they are placed. Courts should not examine the philosophy of the education of the handicapped, but rather the individual child in the particular learning environment. The question to be asked is not whether there is any marked trend in educating children with a certain handicap, but whether this child in this program is receiving an adequate education, appropriate to her needs and abilities, in the least restrictive environment.

Judicial Restraint in Education Decision-making

Our nation's courts have long cautioned judicial restraint with regard to local educational affairs and have permitted educational officials a greater deal of discretion in making their decisions. Courts have recognized that education can function effectively only if school boards are granted broad authority to determine the subjects to be taught, the curriculum deemed most suitable, and the methods of teaching to be employed.

This Court emphasized in *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968), that:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Earlier, in *Abington School District* v. *Schempp*, 374 U.S. 203, 300-301 (1963) (Brennan J., concurring), Justice Brennan had issued the following words of caution:

> We should heed Mr. Justice Jackson's caveat that any attempt by this Court to announce curricular standards would be "to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes." Illinois ex rel. *McCollum* v. *Board of Education*, supra, [333 U.S.] at 237.

This deference to local control is a recognition of the varying wants and needs of the Nation's diverse and varied communities, each with its unique character, standards and sense of social importance of a variety of values. *Mercer* v. *Michigan State Board of Education*, 379 F. Supp. 580, 585 (E.D. Mich.), *aff'd. mem.*, 419 U.S. 1801 (1974).

Amici respectfully submit that the courts below based their decisions to mandate that an interpreter be provided on a bias in favor of a particular educational theory. This approach was not only contrary to traditional case law cautioning judicial restraint in education but, as stated previously, to some of the basic provisions and purposes of P.L. 94-142 itself.

As pointed out in the dissent of Judge Mansfield below, respondents' experts who had observed Amy Rowley did not testify either at the impartial hearing or in the district court proceeding. Those who did testify never observed this student in class, and based their testimony on the premise that since she is deaf, she requires an interpreter. All the school district personnel who had worked with this child or who had observed her performance, however, testified that she had performed very well, both academically and socially in her current program, and that the services of a sign language interpreter would be unnecessary and perhaps detrimental.

Despite this evidence, the district court concluded, in a simple syllogism, that since all the experts who testified stated that every deaf child fares better in class with an interpreter, and since Amy Rowley is deaf, an interpreter is required in this case. The district court then went on to conclude that if there was something unique about this child which would render these generalizations less applicable to her it was due in large part to "her superior intellectual and personal abilities for which she should not be penalized." 483 F. Supp. at 535.

Even conceding the correctness of both of these conclusions of the district court, the ultimate conclusion reached by the court is still a startling departure from traditional case law involving educational decision-making. In essence, it holds that a school district must provide a particular service because a particular educational theory which utilizes that service is now in vogue.

This conclusion is more startling when set against the general backdrop of P.L. 94-142, which requires that the *unique* needs of each individual handicapped child be assessed. The district court's conclusion, adopted by the Second Circuit, in effect turns this requirement on its head by starting with a general premise that all members of a certain class of handicapped children must receive a certain

service, and then stating that the school district has the burden of showing how this particular child is a unique member of her class.

Amici wish to emphasize that they do not dispute that P.L. 94-142 does grant the federal courts jurisdiction to review state and local agency decisions, to hear additional evidence and to base its decision on a preponderance of the evidence. We do submit, however, that nothing in that enactment or in previous case law requires that school officials follow what the courts perceive to be the best educational theory, so that a child who is already performing adequately may further develop his or her potential.

Further, it is the position of amici that the purpose of the individualized education program requirement is to assure that the district follow a procedure of individually assessing each child and using the expertise of the district's special education teachers, counselors, etc., develop a program which is designed for that individual child. The duty of the courts, in turn, is to examine the *process* followed by the school district, not the *substance* of the educational decisions which were made by the district. If the school district followed the procedures set out in the law and there is a rational basis for the decisions made by the district, those decisions should stand, even though there may be experts which disagree with the district's experts, and even though the court may have reached a different decision had it been called upon to make the initial recommendations.

The Department of Health, Education and Welfare, in its analysis of the final regulation under Section 504 of the Rehabilitation Act of 1975, which prohibits discrimination against qualified handicapped persons, states as follows:

> It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process pro-

> cedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education. 42 Fed. Reg. No. 86, May 4, 1977, Appendix A.

That analysis should apply, as well, to the courts which are grappling with the question of whether a particular handicapped child has been offered an equal opportunity and a "free appropriate public education" under P.L. 94-142.

Examples of recent decisions which have cautioned or rejected the approach of mandating particular kinds of programs or services in cases involving educational issues may be found in the field of bilingual education.

In *Keyes* v. *School District No. 1, Denver, Colorado,* 521 F.2d 465 (10th Cir.), *cert. den.*, 423 U.S. 1066 (1976), the United States Court of Appeals for the Tenth Circuit rejected a plan adopted by the lower court as going "well beyond helping Hispanic school children to reach the proficiency in English necessary to learn other basic subjects." 521 F.2d at 482. That plan had included proposals extending to matters of educational philosophy and curriculum development. The Tenth Circuit stated that "[I]nstead of merely removing obstacles to effective desegregation, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children." *Id.*

In the present case much weight was attached by the district court to tests which indicated that Amy Rowley was capable of discriminating approximately 59 percent of what was spoken in class. The district court also found that with the use of the "total communication" teaching method, she could identify 100 percent of the words spoken to her. 483 F. Supp. at 532. In addition, the court held that her performance on achievement tests did not establish

that she was learning "all she would be learning if she were not deaf," and that her I.Q. "does not represent the full measure of her potential." 483 F. Supp. at 534-535.

As pointed out in the dissenting opinion of Judge Mansfield below, these statements are speculative at best and not supported by the testimony of persons who observed this child in the classroom. Evaluating the potential of any child is extremely difficult as is evaluating the effects of specific methods of educating handicapped children. *See* Kirp, Buss and Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40, 47 (1974). The definition of a free appropriate public education formulated by the district court, however, not only assumes that this can be done but treats this definition as a guarantee that handicapped children must learn all that they would be learning if they were not handicapped. No such guarantee, we submit, exists in either the Act or in current regulations.

It should be noted that this guarantee concept has been implicitly rejected in the regulation governing accountability for the individualized education program. *See* 34 C.F.R. § 300.349. That regulation states, in part, that "the Act does not require that any agency, teacher or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives." The accompanying comment indicates that while agencies and teachers are not relieved from making good faith efforts in achieving the goals set forth in the IEP, the regulation was intended to "relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate."

This regulation reflects an understanding of several basic problems. First, there is the uncertainty as to the effectiveness of various methods of classifying and educating handi-

capped children. As the Court of Appeals for the Seventh Circuit noted in *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981), a case involving the right to obtain damages under P.L. 94-142:

> Moreover, in as new and undeveloped a field as special education, there is a need for flexibility and experimentation in programming for handicapped children. We take judicial notice of the fact that at the present time, problems of classification and treatment abound. Disagreements will arise and errors will be made. *Id.* at 1213.

More particularly, education of the deaf has been marked by centuries-old battles between methods of education and has remained highly controversial. *See generally*, Large, *Special Problems Of The Deaf Under The Education For All Handicapped Children Act of 1975*, 58 WASHINGTON UNIVERSITY LAW QUARTERLY 213, 229 (1980). Research comparing different methods is at best inconclusive, and no method has ever worked sufficiently well to receive uncritical acceptance. While the district court in this case cited the total communication method as being superior, that method has its weaknesses, especially when viewed in terms of the mainstreaming requirements of P.L. 94-142. Large, *Special Problems Of The Deaf*, *supra*, at 236-237.

Given the fact of the differences between children, the approach of the courts below could be potentially harmful to numerous deaf children, since it assumes that one program works well for all children possessing that handicap. Just as the district court recognized that I.Q. tests are not always correct indicators of a child's potential, *see* Smith and Knoff, *School Psychology and Special Education Students' Placement Decisions: I.Q. Still Tips The Scale*, 15 JOURNAL OF SPECIAL EDUCATION, 55, 62 (1981), it should have recognized that generalized statements concerning one teaching method could not supply a guarantee of an individual child's improved performance.

Second, the regulation is in line with recent case law from both New York and California dismissing actions for "educational malpractice." In each of these decisions the court emphasized the difficulties the judicial system would have in dealing with conflicting educational theories and with a guarantee of achieving minimum, let alone maximum, educational potential.

In *Donohue* v. *Copiague Union Free School District*, 64 A.D.2d 29 (1978), *aff'd.*, 47 N.Y.2d 440 (1979), the appellant entered Copiague Senior High School in September 1972 and graduated in June 1976. The thrust of his claim was that despite his receipt of a diploma, he lacked the basic ability to read and write on a level sufficient to enable him to complete job applications. Among other things, he alleged that the respondent school district "failed to provide adequate school facilities, teachers, administrators, psychologists, and other personnel trained to take the necessary steps in testing and evaluation processes insofar as [appellant] is concerned in order to ascertain the learning capacity, intelligence and intellectual absorption on the part of [appellant] . . . ."

In its decision, the Court of Appeals said:

> To entertain a cause of action for "educational malpractice" would require the courts not merely to make judgments as to the validity of broad educational policies—a course we have unalteringly eschewed in the past—but, more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies . . . *Id.* at 444-445.

The issues raised in *Donohue* were also present in *Peter W.* v. *San Francisco Unified School District*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976), in which a poorly educated

student alleged negligence on the part of his school district with respect to his education. Specifically, he alleged that the district negligently failed to apprehend his reading disabilities; assigned him to classes inappropriate to his reading level; allowed him to pass to subsequent grade levels knowing that he had not achieved the skills necessary to benefit from advanced grade levels' assigned him to classes in which the instructors were not competent to deal with him; and allowed him to graduate with a reading level lower than that required by law. *See* 60 Cal. App. 3d at 813, 131 Cal. Rptr. at 856.

Throughout its opinion, the court emphasized that the application of traditional tort law with its "duty of care" to such a new cause of action turned, in large part, upon considerations of public policy. In declining to extend this standard to the educational setting, the court stated that:

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject. 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860-61.

As in the appellate division decision in the *Donohue* case, the court reasoned that since there were many factors outside the control of the school district which could influence a student's progress in school, there was simply no workable duty of care against which the school district's conduct could be measured. *See* 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860-861, at 64 A.D.2d at 39. The court also noted that since education today is the subject of such controversy and dissatisfaction, an opposite result would expose school districts to a countless number of real or imagined tort claims by students and their parents. *See* 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

At least one district court has utilized these cases in its analysis of P.L. 94-142. In *Loughran* v. *Flanders*, 470 F. Supp. 110 (D. Conn. 1979), the court held that this legislation did not serve as a basis for a private cause of action for damages. In so holding, the court stated that:

> A final factor to be considered is whether the purported cause of action is one traditionally relegated to state law, in an area basically the concern of the states. *Cort* v. *Ash*, supra at 78, 95 S. Ct. 2080. The plaintiff is essentially alleging that he is the victim of educational malpractice. The few reported cases on this type of claim have all arisen in a state forum. *See, e.g., Donohue* v. *Copiague* U Free Sch. Dist., 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978) (held: no cause of action); *Peter W.* v. *San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976) (Held: no cause of action); *Hoffman* v. *Board of Ed. of City of N.Y.*, 64 A.D.2d 369, 410 N.Y.2d 99 (1978) (held: cause of action); for misfeasance on part of school officials in failure to follow therapeutic timetable established by school psychologist).
>
> "The plaintiff has not cited nor can this Court find any federal case which has recognized this type of action. The claim for damages necessarily hinges upon questions of methodology and educational priorities, issues not appropriate for resolution by this Court, since they present a '. . . myriad of intractable economic, social and even philosophical problems.' *San Antonio School Dist.* v. *Rodriguez*, 411 U.S. 1, 42, 93 S. Ct. 1278, 1301, 36 L. Ed. 2d 16 (1972), quoting from *Dandridge* v. *Williams*, 397 U.S. 471, 487, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). 470 F.Supp. at 115.

While respondents may argue that this is not an educational malpractice case nor one involving a claim for damages, amici contend that the approach and analysis utilized by the district court in this case in developing the definition of an appropriate education under P.L. 94-142 was based on the very assumptions which were rejected in the malpractice cases. This can readily be seen as examining several of that court's basic conclusions.

First, the district court held that while the evidence showed that Amy Rowley "performs better than the average child and is advancing easily from grade to grade," 483 F.Supp. at 534, such evidence did not establish that this child was learning "all she would be learning if she were not deaf," *id.*, and that her "educational shortfall" must be compared with that experienced by non-handicapped children. *Id.* How are federal courts to determine whether a handicapped child is learning all that he or she would be learning if not handicapped if our courts are uncertain why average children achieve or fail to achieve educational goals. This is precisely what the educational malpractice cases were all about. Instead of recognizing this fact, however, the district court proceeded to conclude in an almost off-hand manner, without receiving detailed evidence concerning her non-handicapped classmates, that these children were not achieving their educational goals because of controllable factors while Amy Rowley's failure to achieve was due solely to her handicap:

> While it is true, as defendants contend that no child understands 100% of what is taught in class, the failures of other children can be attributed either to lack of intellectual potential, in which case there is no shortfall relevant to the standard described above, or to a lack of interest or energy, factors which can be controlled and which it is the purpose of a school to develop. Amy's lack of understanding, by contrast, is inherent in her handicap and is precisely the kind of deficiency which the Act addresses in requiring that every handicapped child be given an appropriate education. 483 F.Supp. at 535.

Equally troublesome is the court's statement that the school district's emphasis on Amy Rowley's classroom performance ignored "the importance of comparing her performance to that of non-handicapped students of similar intellectual calibre and comparable energy and initiative." 483 F.Supp. at 534.

No individual comparisons, however, were ever made either by the court or by the impartial hearing officer or the Commissioner of Education. As Judge Mansfield indicated in his dissenting opinion below, this kind of process, along with that of determining the "educational shortfall" of children, would pose an impossible burden on school districts while subjecting children to a battery of tests. 632 F.2d at 945.

The problem with making such comparisons with non-handicapped students is that it leads directly to the difficulties expressed by the decisions in the *Donohue* and *Peter W.* cases. Aside from the practical problems previously mentioned concerning the measuring and comparing of students of "similar intellectual calibre" and "comparable energy and initiative," the simple fact is that there are too many factors outside the control of school districts which may influence a child's progress in school. If the definition formulated by the district court is adopted as the correct standard under P.L. 94-142, a major question for all future litigation, both at the state and federal level, will be to what extent the performance of handicapped and non-handicapped students is being influenced by such outside factors. If such assessments were difficult in the context of educational malpractice cases they will be even more difficult when hearing officers, state agencies and the courts must make them in determining an appropriate education under P.L. 94-142.

The district court's heavy reliance on expert testimony concerning trends in educating children with a particular handicapping condition also has enormous implications for future litigation. One need only set the same procedural stage as the present case and then apply it to a child with a different handicap. The entire focus of the administrative proceedings at the state level and of court review under 20 U.S.C. § 1415(c) would shift from an assessment of the individual child's needs and performance to an

examination of theories. The emphasis would be not on first-hand observation and evaluation of the child but on providing expert testimony concerning a class of children. Such experts would quarrel over which services and methods of instruction will best develop the potential of the child with that type of handicap. This is precisely the kind of judicial involvement in educational theory that our courts have always cautioned against, and it would expose our nation's school districts to numerous claims that handicapped children would fare better with a particular kind of service or method of instruction.

In formulating a definition of what constitutes an appropriate education under P.L. 94-142, this Court's decision will be setting a precedent for years to come, when technological advances may overtake such a legal definition and outstrip a school district's ability to provide needed education to all students. If, as the courts below suggested, a district must establish that a handicapped child is learning all she could be learning if she were not handicapped, or if a child is required to receive a service because all children with that handicap perform better with that service, the possibilities will be endless. There will be no limit to the amount and kinds of services which must be provided unless and until the court is satisfied that the particular child involved is performing up to his or her potential. All these demands will be made in the context of current fiscal belt-tightening on the part of federal and state government as well as local school districts.

Amici respectfully submit that pursuant to P.L. 94-142, courts should not examine the philosophy of educating the handicapped but rather the individual child in the particular learning environment. The question to be asked is not whether there is any marked trend in educating children with a certain handicap, but whether this child in this program is receiving an adequate education appropriate to her needs and abilities, in the least restrictive

environment. In the present case, we submit that this question must be answered in the affirmative.

Supreme Court Decisions Under Section 504 and Under the Developmental Disability Act

In the case of *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), the Supreme Court considered its first case brought under Section 504. The question in that case was how far an institution of higher education must go to accommodate the handicap of a deaf applicant to its nursing program. The 4th Circuit had ruled that Section 504 requires "affirmative conduct" on the part of Southeastern to modify its program to accommodate the disabilities of applicants, "even when such modifications become expensive."

The Department of Health, Education and Welfare, in its regulation implementing Section 504 requires "modifications to [a college's] academic requirements as are necessary to ensure that such requirements do not discriminate on the basis of handicap. . . ." 34 C.F.R. § 104.44 (a). The Supreme Court in *Davis* held that:

> [i]f these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of Section 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute.
>
> The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps. *Id.* at 410.

The Court dismissed the contention of the Government which argued in its *amici* brief that Section 504 requires affirmative action. "[I]t is undisputed that respondent

could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirements upon an educational institution to lower or effect substantial modifications of standards to accommodate a handicapped person." *Id.* at 413.

What Amy Rowley is seeking here is not services to allow her to take advantage of the educational system. The relief requested is not in the category of providing equal opportunity or elimination of discrimination. It is affirmative action to enable her to achieve her maximum potential, and as such, should be judged by the standards set forth in *Davis,* which recognizes that there is a limit to the duty upon a federal recipient to accommodate the interests of handicapped persons.

On April 20, 1981, the United States Supreme Court handed down an opinion in the case of *Pennhurst State School and Hospital et al.* v. *Halderman et al.,* —— U.S. ——. 101 S.Ct. 1531 (1981), which, although interpreting a law which is distinguishable from P.L. 94-142, contains some important language relating to the interpretation of the intent of Congress in passing such laws.

Plaintiffs sought the closing of Pennsylvania's Pennhurst State School and Hospital, a facility for the care and treatment of the mentally retarded, and urged that "community living arrangements" be established for its residents. The district court held that conditions at Pennhurst violated the federal constitutional right to be provided with "minimally adequate habilitation" in the "least restrictive environment," and also found violations of the Equal Protection Clause, the Eighth Amendment and Section 504. Pennhurst was ordered closed and suitable "community living arrangements" provided for all Pennhurst residents. A Special Master was appointed to supervise the implementation of the order.

The court of appeals affirmed the appointment of a Special Master, but declined to reach the constitutional

claims, instead resting its order on its construction of the Developmentally Disabled Assistance and Bill of Rights Act. This Act was raised on the court's own initiative, none of the Plaintiffs having raised it.

The Court in Pennhurst notes that the Act in question was passed by the Congress pursuant to its Spending Power rather than under Section 5 of the Fourteenth Amendment. Thus, "the legitimacy of the Congress' power to legislate . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'. . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." —— U.S. at ——, 101 S.Ct. at 1539-40.

When the State of New York and the Hendrick Hudson Central School District accepted funding under P.L. 94-142 and the requirement of a "free appropriate education," they did not knowingly accept a requirement that they must provide all services, equipment, etc. to assure that each child achieves 100% of his or her "maximum potential."

The Supreme Court also noted in interpreting the intent of Congress that the extent of the financial burden created would be a relevant consideration in determining whether Congress implicitly mandated the relief sought by the plaintiffs.

> The fact that Congress granted to Pennsylvania only $1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing "appropriate" treatment in the "least restrictive" setting, confirms that Congress must have had a limited purpose in enacting 6010 [the Bill of Rights]. When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs. . . . It defies common sense, in short, to suppose that Congress implicitly imposed this massive obligation on participating States.

> . . . The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice. *Id.* at ——, 101 U.S. at 1543.

CONCLUSION

As states have taken on the duty to educate the students within their borders—at least to a minimum degree—the amount of effort differs depending upon the needs of individual students. However, schools cannot right all the wrongs of nature and society. Somewhere in the context of providing equal educational opportunity for all children, states and local school districts must also make hard decisions as to what will be taught and in what context. The courts are probably the worst forum in which to make such decisions and, in the absence of a clear violation of the law, should stay out of educational decisionmaking.

In a treatise arguing for equality of opportunity for the handicapped, Frederick J. Weintraub and Alan R. Abeson define "educational equality" as "equality of access to different resources to attain different individual goals." Weintraub and Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 Syracuse L. Review 1037, 1056 (1972). That is a good, balanced definition. However, the schools cannot be held accountable for *achieving* their set goals for handicapped children while not achieving goals set for non-handicapped children. Within the confines of limited resources, all that can be expected is that each group of children will have access to the educational system.

Education today is still primarily a state and local matter and since the educational needs of all children are substantial and the costs of meeting them even greater, hard decisions must be made at the state and local levels as to standards and priorities. These decisions must include what will be taught and in what context. The decision of the

court below, however, strives toward maximization of the potential of all handicapped children and mandates that all deaf children receive a certain service. Such a decision strikes at the very heart of educational decision-making at the state and local levels, and will place an enormous financial burden on local school districts. School districts should not, we submit, be held financially accountable for the achievement of the full potential of handicapped children when no such requirement exists for the non-handicapped. Variations in the maturity, abilities and family backgrounds of all children make this an impossible goal. All that should be required is the provision of an adequate education to all children in a setting which allows them to acquire academic expertise, social skills and moral values necessary to become members of society.

Recognition of the right of handicapped children to equal protection of law should not lead to a judicial definition of the nature of the educational program for all children with a particular handicapped condition based on a blanket philosophy of educational needs. To do so would shift very basic educational decision-making into a forum which the courts themselves have recognized to be inappropriate.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy Legal Counsel
National School Boards Association
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 337-7666

THOMAS A. SHANNON
Executive Director
National School Boards Association

AUGUST W. STEINHILBER
Associate Executive Director
and Legal Counsel
National School Boards Association

McGIVERN, SHAW &
O'CONNOR
Attorneys for the New York
State School Boards
Association, Inc.
119 Washington Avenue,
Albany, New York 12210
(518) 465-3474

Of Counsel:
NORMAN H. GROSS, ESQ.

CERTIFICATION OF SERVICE

I, Gwendolyn H. Gregory, hereby certify that on _____, 19____, I served the foregoing Amici Curiae Brief of the National School Boards Association and the New York State School Boards Association, Inc. in Support of Appellants by first class mail, postage prepaid, upon the following:

Michael A. Chatoff
Attorney for Appellee, Amy Rowley et al.
192-05 Radnor Road
Jamaica, New York 11423

Rex Lee
Solicitor General

James P. Turner
Acting Assistant Attorney General

Walter W. Barnett, Attorney

Louise A. Lerner, Attorney

Department of Justice
Washington, D.C. 20530

Raymond G. Kuntz
Teresa Kiernan Kuntz
Attorneys for Appellant
Hendrick Hudson Central School District
Hunting Ridge Mall
Bedford Village, New York 10506

Paul E. Sherman, Jr.
Jean M. Coon
Attorneys for Appellant Commissioner of Education
State Education Building
Albany, New York 12234

/s/ GWENDOLYN H. GREGORY
Gwendolyn H. Gregory
Deputy Legal Counsel
National School Boards Association